

Preliminary Assessment of Marihuana Cases at the MSP Forensic Services Group - Crime Laboratory and the Impact of 2008 Ballot Question #2

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Prepared for informational purposes only

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Acknowledgements

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Issue

In November 2008, the citizens of Massachusetts voted affirmatively on Ballot Question 2 (Question 2") which imparts lighter penalties than previous for possession of marihuana (also spelled marijuana). This new law ("Initiative"), once implemented, will have an impact on the Massachusetts State Police Drug Unit.

The following information was gathered to assist in anticipating and preparing for the impact of Question 2 on the Massachusetts State Police Forensic Services Group (MSP FSG). The information can be used by the MSP FSG to prepare stakeholders by understanding the following factors:

- The number of marihuana cases weighing less than one ounce (28 grams) analyzed by the MSP Drug Unit during calendar years 2007 and 2008.
- Costs associated with the analysis of marihuana.
- The number of marihuana cases analyzed by the MSP Drug Unit that are classified as Class C.

2008 Ballot Question 2 Summary

This law replaced the criminal penalties for possession of one ounce or less of marijuana with a new system of civil penalties, to be enforced by issuing citations, and would exclude information regarding this civil offense from the state's criminal record information system. Offenders age 18 or older would be subject to forfeiture of the marijuana plus a civil penalty of \$100. Offenders under the age of 18 would be subject to the same forfeiture and, if they complete a drug awareness program within one year of the offense, the same \$100 penalty.

Offenders under 18 and their parents or legal guardian would be notified of the offense and the option for the offender to complete a drug awareness program developed by the state Department of Youth Services. Such programs would include ten hours of community service and at least four hours of instruction or group discussion concerning the use and abuse of marijuana and other drugs and emphasizing early detection and prevention of substance abuse.

The penalty for offenders under 18 who fail to complete such a program within one year could be increased to as much as \$1,000, unless the offender showed an inability to pay, an inability to participate in such a program, or the unavailability of such a program. Such an offender's parents could also be held liable for the increased penalty. Failure by an offender under 17 to complete such a program could also be a basis for a delinquency proceeding.

The law defines possession of one ounce or less of marijuana as including possession of one ounce or less of tetrahydrocannabinol ("THC"), or having metabolized products of marijuana or THC in one's body.

Under the law, possessing an ounce or less of marijuana could not be grounds for state or local government entities imposing any other penalty, sanction, or disqualification, such as denying student financial aid, public housing, public financial assistance including unemployment benefits, the right to operate a motor vehicle, or the opportunity to serve as a foster or adoptive parent. The law allows local ordinances or bylaws that prohibit the public use of marijuana, and would not affect existing laws, practices, or policies concerning operating a motor vehicle or taking other actions while under the influence of marijuana, unlawful possession of prescription forms of marijuana, or selling, manufacturing, or trafficking in marijuana.

The money received from the new civil penalties would go to the city or town where the offense occurred (It is unclear whether the MSP will receive any funds).

For reference, the Initiative is provided as Appendix A at the end of this report.

MSP Drug Unit Procedure Summary

Currently at the Massachusetts State Police Drug Unit, suspected marijuana is weighed and then a portion of the sample is used for analysis. This analysis consists of a macroscopic examination, olfactory exam, microscopic examination and the modified Duquenois-Levine test. All aspects of this analysis must be positive for a result of marijuana. The modified Duquenois-Levine test is a color test that reacts with the cannabinoids in marijuana.

For cases with a suspected tetrahydrocannabinoid content greater than 2.5%, besides doing the testing described above the sample is quantitated against a known standard using a sophisticated analytical technique involving a Gas Chromatograph with a Mass Selective Ion Detector (GC/MS). This test enables the chemist to report whether the substance qualifies as a Class C substance (THC content must be greater than 2.5% for vegetable matter to be classified as Class C, as opposed to Class D). The Drug Unit automatically determines the THC content for suspected resinous matter/compressed green/brown matter (i.e., hash) or hashish oil. THC testing on vegetable matter (marijuana) is currently done by request only.

Potential Inconsistencies in the *Initiative* Affecting Analysis and Operations

The Initiative defines possession of one ounce or less of marijuana as including possession of *one ounce or less of tetrahydrocannabinol (THC)*. By including THC in the specific definition, the law will impact the MSP Drug Unit's approach to accurately reporting whether or not a sample is a controlled substance. Whereas in the past the MSP Drug Unit would weigh the sample and conduct routine tests to determine violation of the law, the MSP Drug Unit may now have to analyze samples using sophisticated scientific techniques such as GC/MS to determine

the amount of THC present. This impacts all marihuana and THC cases. For example, regardless of the weight of the marihuana, requests for analysis of the THC content might increase to determine if the substance is in violation of MGL Chapter 94C, Section 31. Further legal interpretation is needed to determine which scenarios are in violation of the new law.

The MSP Drug Unit currently analyzes vegetable matter (marihuana) samples for THC content by request only. Because this is not routine, there is insufficient data to report specifics concerning the frequency of high potency marihuana. However, the Drug Unit suspects a trend towards higher potency marihuana. This marihuana is typically grown in a “hot house” and tends to be sinsemilla. By definition, this is highly potent marijuana from female plants that are specially tended and kept seedless by preventing pollination in order to induce a high resin content. It usually has a THC content of greater than 2.5%, which constitutes it as a Class C substance.

As currently written, the Initiative addresses only weight and does not reference the issue of THC content in MGL Chapter 94C (excerpts incorporated in Appendix B). The deciding factor – weight or THC content – is ambiguous. The apparent loop-hole might prompt stakeholders to request additional THC testing on all marihuana samples confiscated – regardless of weight - on the chance that the THC content is over 2.5% and would thus qualify the substance as a Class C. In addition, though the Initiative clearly relates to marihuana, some language in the Initiative related to THC could be ambiguously interpreted to indicate that hash or hash oil falls into the weight requirement. The resulting confusion between the Initiative and MGL Chapter 94C requires clarification for consistent interpretation and reporting on drug certificates.

MSP Drug Unit Metrics

	2007	2008 YTD	TOTAL (2007-2008)
Total Drug Cases Tested	10,724	8,187	18,911
Marihuana Cases Tested	3,865	3,183	7,048
Marihuana Cases Under 28 grams	3,495	2,878	6,373
% Marihuana Cases Under 28 grams (1 ounce)	90%	90%	90%
% Total Drug Cases Under 28 grams (1 ounce)	32%	35%	34%

Summary

90% of the marihuana cases tested in 2007-2008 weighed less than 1 ounce.

34% of the total cases analyzed in 2007-2008 were marihuana cases that weighed less than 1 ounce.

Note that these metrics reflect cases with marihuana regardless of the number of samples. A case with many marihuana samples is counted as one case. Similarly, a case with pills and marihuana is counted as one case.

Assessment of MSP Drug Unit Resources Related to Marijuana Analysis

As explained above in MSP Drug Unit Procedure Summary, the routine analysis of marijuana samples is relatively straight-forward. The consumable cost for the routine analysis is low, with each analysis costing approximately \$30 and requiring a total consumable budget of under \$2,000 for this testing annually. Chemicals such as ethanol, paraldehyde, vanillin, hydrochloric acid, and methylene chloride are needed. The MSP Drug Unit needs to stock these chemicals regardless of this Initiative, but the volume used annually may be reduced if fewer cases are submitted for analysis. Currently less than \$1,000 (less than 10%) of the annual office supply budget for the MSP Drug Unit is attributed to the analysis and reporting of marijuana cases (paper, toner, etc). This figure may or may not change with this initiative, as explained below.

The instrumentation used for the routine analysis of marijuana includes balances and microscopes. The sophisticated analytical technique used to analyze samples for THC content utilizes a GC/MS. All of this equipment is standard equipment in the Drug Unit and is also used for the analysis of other controlled substances. These are needed regardless of this initiative, but if THC testing increases then additional instruments will be needed.

Currently it is estimated that nearly 15% of Drug Unit chemists' time is spent conducting analysis of marijuana and THC cases. A typical analysis requires less than 1 hour (plus time to generate the report). The analysis time is increased to nearly 3 hours when sophisticated testing using the GC/MS is required. Likewise, nearly 15% of support staff time is spent preparing reports and conducting data entry for tracking purposes related to marijuana and THC cases.

Although one might presume that equipment costs, consumable costs, and staff time might be reduced with this Initiative, the opposite may be true depending upon legal interpretations.

- Though there might be a decrease in the submission of cases containing marijuana that obviously weighs less than 28 grams, there might be an increase in requests for time-consuming, sophisticated analysis of marijuana cases weighing over 28 grams to determine the THC content. The THC content information could be used to convince the court that the possession of a substance, though over 28 grams, is not a violation of the new law since the total THC content – once extrapolated - would likely be less than 28 grams. Currently this would affect only those cases weighing over 28 grams, which is 10% of the current marijuana cases.
- Conversely, the amount of total marijuana submissions might remain the same as current but the requests for THC content might become the routine for marijuana cases. This would be in an attempt to determine if the substance is high potency with an THC content over 2.5%, which would elevate the possession from a civil infraction to a criminal offense (Class C). This impact would triple the amount of time required to analyze marijuana samples, which because of the routine nature currently occupies 15% of chemists' time. This approach would have a negative impact on productivity in the Drug Unit under current staffing levels.

Given the increased time needed to conduct the THC analysis, the actual MSP Drug Unit resource needs might increase depending on how the law is applied and the policies adopted.

Outstanding Issues Requiring Further Action

Importantly, the MSP Drug Unit will likely need to cease accepting cases with marihuana weighing less than 28 grams. Because the initiative makes possession of this amount a civil offense rather than criminal, it no longer meets the criteria for analysis at the Crime Laboratory. Since the role of the Crime Lab is to analyze evidence in criminal cases, the presumption is that marihuana samples weighing less than 28 grams will no longer be accepted.

One complicating factor is a common submission type that includes multiple forms of drugs. A typical submission might contain tablets and marihuana. The Drug Unit will still accept and test the tablets, but should not be accepting the marihuana. If the Crime Lab does accept this sort of marihuana evidence but does not analyze the samples, it consumes valuable resources to enter data, track the chain-of-custody, and report the items as not examined.

The MSP Drug Unit requires legal opinion concerning the application of this Initiative and its relation to MGL Chapter 94C. The Crime Lab will need to develop a concise decision-tree to guide the chemists on interpreting weight versus THC content in assigning classifications to results.

The MSP Drug Unit will need to convene discussions with stakeholders to ensure broad understanding of the Crime Lab's acceptance policy and the analyses that the MSP Drug Unit will conduct and report. The discussion may lead to trainings, whereby officers receive a demonstration of the volume of marihuana that one would expect to weigh less than 28 grams. Besides a visual estimate of weight, there may need to be a more scientific assessment of the weight of the confiscated material. This is a question requiring legal guidance.

The MSP (including Troop evidence officers) will need to determine a mechanism for disposal of the marihuana samples that are confiscated but weigh less than 28 grams. Controlled substances confiscated by MSP Troopers currently travel through the MSP Drug Unit, to court, to the storage locations overseen by the MSP Narcotics Inspection Unit (NIU), and ultimately are destroyed in a controlled manner. The NIU utilizes the Crime Laboratory's Laboratory Information Management System (LIMS) to track the chain of custody of all MSP drugs. If marihuana cases weighing less than 28 grams are not submitted to the Crime Laboratory, they will not have LIMS numbers and will need to be tracked differently than other cases.

With this initiative, the MSP Drug Unit's report templates may need to be reformatted to address the needs of stakeholders, comply with new requirements, and appropriately report the information (e.g., no examination, Class C) when needed. These changes will be implemented by the Laboratory Director and MSP Drug Unit, with input from the Massachusetts District Attorney's Association (MDAA), the Executive Office of Public Safety and Security (EOPSS), and the Massachusetts State Police.

Conclusions

This preliminary assessment of marihuana cases at the MSP Drug Unit contains information to begin discussions and planning for policy changes at the MSP Crime Laboratory. Logistics surrounding submission, analysis and reporting remain to be finalized, but it is expected that progress will be made in the very near future to address the changes resulting from the 2008 Ballot Question 2.

Appendix A - The Initiative

OFFICE OF THE ATTORNEY GENERAL

INITIATIVE PETITION INFORMATION SHEET

TITLE OF PETITION: An Act Establishing a Sensible State Marihuana Policy

(Version A)

PETITION NUMBER: 07-09

PROPOSERS' CONTACT PERSON: Whitney Taylor

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Will the proponents propose a summary by the Monday 5 days after the petition-filing deadline? (optional) Yes [X] No []

Will the proponents submit a memo of law by the Friday 9 days after the petition-filing deadline? (optional) Yes [X] No []

AG STAFF PERSON RECEIVING PETITION: P. Sacks

DATE: 8/1/2007

AN ACT ESTABLISHING A SENSIBLE STATE MARIHUANA POLICY

Be it enacted by the People, and by their authority as follows:

Section 1. This Act consists of five sections which together shall be known as "An Act Establishing A Sensible State Marihuana Policy."

Section 2. Chapter 94C of the General Laws is hereby amended by inserting therein a new Section 32L, making the possession of one ounce or less of marihuana punishable only by civil penalties and forfeiture. That new section shall read as follows:

Section 32L. Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification. An offender under the age of eighteen shall be subject to the same forfeiture and civil penalty provisions, provided he or she completes a drug awareness program which meets the criteria set forth in Section 32M of this Chapter. The parents or legal guardian of any offender under the age of eighteen shall be notified in accordance with Section 32N of this Chapter of the offense and the availability of a drug awareness program and community service option. If an offender under the age of eighteen fails within one year of the offense to complete both a drug awareness program and the required community service, the civil penalty may be increased pursuant to Section 32N of this Chapter to one thousand dollars and the offender and his or her parents shall be jointly and severally liable to pay that amount.

Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent. Information concerning the offense of possession of one ounce or less of marihuana shall not be deemed "criminal offender record information," "evaluative information," or "intelligence information" as those terms are defined in Section 167 of Chapter 6 of the General Laws and shall not be recorded in the Criminal Offender Record Information system.

As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana or tetrahydrocannabinol, laws concerning the unlawful possession of prescription forms of marihuana or tetrahydrocannabinol such as Marinol, possession of more than one ounce of marihuana or tetrahydrocannabinol, or selling, manufacturing or trafficking in marihuana or tetrahydrocannabinol. Nothing contained herein shall prohibit a political subdivision of the Commonwealth from enacting ordinances or bylaws regulating or prohibiting the consumption of marihuana or tetrahydrocannabinol in public places and providing for additional penalties for the public use of marihuana or tetrahydrocannabinol.

Section 3. Chapter 94C of the General Laws is further amended by inserting a new Section 32M emphasizing education concerning the effects of drug usage for youthful offenders. That new section shall read as follows:

Section 32M. An offender under the age of eighteen is required to complete a drug awareness program within one year of the offense for possession of one ounce or less of marihuana. In addition to the civil penalties authorized by Section 32L and 32N of this Chapter, the failure of such an offender to complete such a program may be a basis for delinquency proceedings for persons under the age of seventeen at the time of their offense.

The drug awareness program must provide at least four hours of classroom instruction or group discussion and ten hours of community service. In addition to the programs and curricula it must establish and maintain pursuant to Section 7 of Chapter 18A of the General Laws, the bureau of educational services within the department of youth services or any successor to said bureau shall develop the drug awareness programs. The subject matter of such drug awareness programs shall be specific to the use and abuse of marihuana and other controlled substances with particular emphasis on early detection and prevention of abuse of substances.

Section 4. Chapter 94C is further amended by inserting a new Section 32N providing for enforcement of the sensible marihuana policy at the local level, utilizing the non-criminal disposition procedures specified in Section 21D of Chapter 40 of the General Laws, so far as apt. That new section shall read as follows:

Section 32N. The police department serving each political subdivision of the Commonwealth shall enforce Section 32L in a manner consistent with the non-criminal disposition provisions of Section 21D of Chapter 40 of the General Laws, as modified in this Section.

The person in charge of each such department shall direct the department's public safety officer or another appropriate member of the department to function as a liaison between the department and persons providing drug awareness programs pursuant to Section 32M of this Chapter and the Clerk-Magistrate's office of the District Court serving the political subdivision. The person in charge shall also issue books of non-criminal citation forms to the department's officers which conform with the provisions of this Section and Section 21D of Chapter 40 of the General Laws.

In addition to the notice requirements set forth in Section 21D of Chapter 40 of the General Laws, a second copy of the notice delivered to an offender under the age of eighteen shall be mailed or delivered to at least one of that offender's parents having custody of the offender, or, where there is no such person, to that offender's legal guardian at said parent or legal guardian's last known address. If an offender under the age of eighteen, a parent or legal guardian fails to file with the Clerk of the appropriate Court a certificate that the offender has completed a drug awareness program in accordance with Section 32M within one year of the relevant offense, the Clerk shall notify the offender, parent or guardian and the enforcing person who issued the original notice to the offender of a hearing to show cause why the civil penalty should not be increased to one thousand dollars. Factors to be considered in weighing cause shall be limited to financial capacity to pay any increase, the offender's ability to participate in a compliant drug awareness program and the availability of a suitable drug awareness program. Any civil penalties imposed under the provisions of "An Act Establishing A Sensible State Marihuana Policy" shall inure to the city or town where the offense occurred.

Section 5. Chapter 94C is further amended by amending its pre-existing penalty provision to conform to the sensible marihuana policy established by this Act. Section 34 of Chapter 94C as appearing in the 2006 official edition is amended by inserting after

the word “Except” appearing in line 5 the words “as provided in Section 32L of this Chapter or” and by inserting the words “more than one ounce of” before the word “marihuana” appearing in line 16.

Appendix B - CHAPTER 94C. CONTROLLED SUBSTANCES ACT (Excerpts)

Chapter 94C: Section 1. Definitions

Section 1. As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:

“Class”, the lists of controlled substances for the purpose of determining the severity of criminal offenses under this chapter.
“Marihuana”, all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake or the sterilized seed of the plant which is incapable of germination.

“Tetrahydrocannabinol”, tetrahydrocannabinol or preparations containing tetrahydrocannabinol excluding marihuana except when it has been established that the concentration of delta-9 tetrahydrocannabinol in said marihuana exceeds two and one-half per cent.

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Chapter 94C: Section 31. Classes of controlled substances; establishment of criminal penalties for violations of this chapter

CLASS C

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

- (1) Chlordiazepoxide
- (2) Chlorhexadol
- (3) Clonazepam
- (4) Clorazepate
- (5) Diazepam
- (6) Flurazepam
- (7) Glutethimide
- (8) Lorazepam
- (9) Methypylon

(10) Oxazepam

(11) Prazepam

(12) Sulfondiethylmethane

(13) Sulfonethylmethane

(14) Sulfonmethane

(15) Temazepam.

(b) Nalorphine

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

[There is no paragraph (d).]

(e) Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) 3, 4-methylenedioxy amphetamine
- (2) 5-methoxy-3, 4-methylenedioxy amphetamine
- (3) 3, 4, 5-trimethoxy amphetamine
- (4) Bufotenine
- (5) Diethyltryptamine
- (6) Dimethyltryptamine
- (7) 4-methyl-2, 5-dimethoxyamphetamine
- (8) Ibogaine
- (9) Mescaline
- (10) Peyote
- (11) N-ethyl-3-piperidyl benzilate
- (12) N-methyl-3-piperidyl benzilate
- (13) Psilocybin
- (14) Psilocyn
- (15) Tetrahydrocannabinols
- (16) 4-Bromo-2, 5-Dimethoxy-amphetamine.

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Chapter 94C: Section 32B. Class C controlled substances; unlawful manufacturer, distribution, dispensing or possession with intent to manufacture, etc.

Section 32B. (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class C of section thirty-one shall be imprisoned in state prison for not more than five years or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than five hundred nor more than five thousand dollars, or both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years, or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years and a fine of not less than one thousand nor more than ten thousand dollars may be imposed, but not in lieu of the mandatory minimum term of imprisonment, as established herein.